

1 the Commission that throughout the six years of this  
2 comparative process, you had intended a commercial/religious  
3 format? Because if you told the Commission that in 1992, you  
4 lied or else you lied in 1987 because in '87, you said you  
5 hadn't decided on your exact format."

6 Well, we now have the Bureau's response to request  
7 for admission and I think ~~generously~~ ~~read~~ ~~not as narrowly~~

1 that they have no evidence of what prompted the designation.  
2 I think that's what D. & E. compels be done before we leave  
3 here.

4 MR. GOLDSTEIN: May I suggest that since the  
5 Commission designated the case and since Mr. Riley has before  
6 him the Bureau's response to his request for admission and he  
7 feels, based upon the response for the request for admission,  
8 there is a procedure to be followed in Section 1.251 of the  
9 Commission's rules.

10 MR. RILEY: Which is what, summary decision? What  
11 is that, sir?

12 MR. GOLDSTEIN: It's summary decision. If that's,  
13 if that's what Mr. Riley is describing to us.

14 MR. RILEY: Well, Your Honor, I would do that and  
15 may well do it, but I'd go back to D. & E. It would seem to me  
16 that Mr. Goldstein could admit or not admit. I don't ask for

1 have a hearing designation order. We have Paragraph Three and  
2 Paragraph Nine stating the basis for this specification of the  
3 issues. It would seem to me that you're on notice as to what  
4 the Commission believes the facts to be and I think that you  
5 can introduce evidence of the documents themselves, you can  
6 introduce evidence, you can put Mr. Bott on the stand and you  
7 can question him about what his intention was at the time he  
8 filed his integration statement, at the time he filed his --  
9 you know, whatever, probably Bott Exhibit One in the  
10 comparative hearing. You can review his testimony with him  
11 and ask him what his intention was at the time that he  
12 testified in this manner, what his intention was throughout  
13 the six-year period, when he formed the basis for his decision  
14 to broadcast a religiously oriented format, what made him  
15 change his mind, what he did in the interim to get the station  
16

1 language and it says these are the issues and directs the  
2 Bureau to issue a Bill of Particulars and this H.D.O., the  
3 facts and the rationale are there, whatever you might think of  
4 them. So I -- you know, and I think you've made it abundantly  
5 clear as to what you think of them. But I think that it would  
6 not be difficult to structure a direct case responsive to this  
7 -- to the concerns expressed in the H.D.O. and I don't think  
8 -- I don't think it's Mr. Goldstein's obligation. This is  
9 also a case where the Commission has placed the burden of  
10 proceeding and the burden of proof on you, you know. Now, if  
11 Mr. Goldstein wants to basically introduce all the pleadings  
12 and introduce the relevant portions of the comparative hearing  
13 record, I would say that he's fulfilled whatever nonburden  
14 that he has.

15 MR. RILEY: Your Honor, let me illustrate the  
16 problem I'm facing.

17 JUDGE STEINBERG: I know exactly what problem you're  
18 facing and I don't know that I can resolve it.

19 MR. RILEY: But I don't think you're obligated to,  
20 except in this sense, Your Honor. I think -- I would suggest  
21 and I would make this as a formal motion within this  
22 prehearing conference orally. I think that you have both the  
23 power and the responsibility, Your Honor, to direct the Bureau  
24 to tell Bott, through his Counsel, what precise factual  
25 questions Bott, with the burden of coming forward in the

1 | burden of proof, is required to resolve. And let me give you  
2 | an example.

3 |           There is nothing within the H.D.O. and nothing  
4 | within the comparative hearing record -- about which I'll make  
5 | one more comment in a moment -- that raises the slightest  
6 | question. No one challenges, no one contradicts in any  
7 | respect Bott's assertion that in 1987 he traveled to  
8 | Blackfoot, Idaho to evaluate the community. That's never been  
9 | challenged within the life of the comparative case nor, Your  
10 | Honor, was it challenged in the pleadings in this proceeding,  
11 | the petition to deny the assignment.

12 |           It is, however, one of the categories of documents  
13 | requested in the Bureau's motion for production. It would  
14 | never occur to me, Your Honor, as the person with the burden  
15 | of proceeding, to prove that Bott traveled to Blackfoot in  
16 | 1987. I don't believe it's an issue. That's a concrete  
17 | example of what I don't think is in issue.

18 |           The Bureau sought documents on the subject. I don't  
19 | believe more largely than that that Bott's comparative hearing  
20 | presentation on integration has been placed in issue by any  
21 | prima facie challenge to its validity or I don't think any of  
22 | it's in issue and would not have planned to offer evidence on  
23 | it.

24 |           D. & E.'s a '65 case, but it's not bad law as we all  
25 | know and in fact, in Catoctin, a 1989 case, it said that,

1 "Although the Commission has discretion to place the burden of  
2 proof for specific issues involving charges of misconduct on  
3 the petition or the Bureau where the principal information  
4 concerning the matters in issue and peculiarly within the  
5 knowledge of the applicant, the burden of proof may be placed  
6 on the applicant." They're talking about --

7 JUDGE STEINBERG: Burden of proof or burden of  
8 proceeding?

9 MR. RILEY: Burden of proof may be placed on the  
10 applicant, not burden of proceeding, although I think in  
11 Catoctin, the burden of proceeding was on the applicant. This  
12 is a renewal case. But what's significant about Catoctin in  
13 my view, harking back to D. & E., is that the Commission's  
14 assuring itself that Catoctin was fully informed of the

1 within the bounds of D. & E., one understands what the precise  
2 factual questions are.

3           And so I renew my request to you, Your Honor, that  
4 you direct the Bureau to tell me what the precise factual  
5 questions are. In opposing our petition for leave to file for  
6 reconsideration, the Bureau said in essence that we're  
7 quarreling with what the Commission did and in supposing there  
8 was a mistake made by the Commission. But then they take a

1 discusses the judge's limited authority under Section 1.115E3  
2 to delete or certify an issue and it's distinguished -- that  
3 order for summary decision.

4 MR. RILEY: I'm not familiar with that, Your Honor.  
5 Certification in that case is on a different rule than the  
6 certification we've requested. It's a different procedural  
7 rule. Isn't that right, Mr. Goldstein?

8 MR. GOLDSTEIN: That's correct. But it does discuss  
9 the (indiscernible) presiding judge's ruling.

10 MR. RILEY: It does, but the prerogative of the  
11 judge to certify under the rule used in Atlantic City is quite  
12 different than the prerogative of the judge to certify on the  
13 rule we've certified -- requested.

14 JUDGE STEINBERG: Let me just rule on Mr. Riley's  
15 motion and I'm going to deny it for the reasons I said  
16 earlier. I think the H.D.O. is specific enough to allow you  
17 to go forward. With respect to the document production, first  
18 you haven't formally objected, but let me just comment with  
19 respect to let's say documents about the visit to Blackfoot.

20 I certainly think that that is the type of evidence  
21 that -- the type of thing which is reasonably calculated to  
22 lead to the discovery of admissible evidence which is the test  
23 for discovery. Whether something like -- whether any  
24 documents or evidence adduced pursuant to that could be  
25 introduced is a matter of relevance that we'll get to with the



1 hearing. It's -- there's more leeway in discovery than there  
2 is in the hearing and so the discovery rule is a lot more  
3 lenient and I can -- I don't know where Mr. Goldstein would be  
4 going by requesting substantiation.

5 I mean, I don't know, but I can take a good guess  
6 and I -- let me just say unofficially, informally that  
7 basically what we have here before us is -- are two questions,  
8 Number One, whether the opposition pleading contained  
9 misrepresentations and a lack of candor and I think more  
10 importantly -- I mean, we can all read those pleadings and see  
11 what they say and -- but Number Two, the H.D.O. places into  
12 question, in my mind, the -- I'm not going to say bonafides,  
13 but whether Mr. Bott, when he represented during the  
14 comparative hearing, that he would move to Blackfoot, live  
15 there, and operate the station on a full-time basis, whether  
16 at the time he made those statements and testified to that  
17 effect really intended to do that and the events which  
18 occurred subsequently, namely going to Blackfoot with the -- I

1 MR. RILEY: Your Honor --

2 JUDGE STEINBERG: And so I think that a lot of this  
3 material which is being requested is -- may be relevant or may  
4 lead to the discovery of relevant -- whatever the text is. I  
5 keep forgetting what it is unless I read it, you know, but I  
6 know it. You know, that's where that's going. That's the way  
7 I presently view the whole picture.

8 MR. RILEY: And your Question Two, Your Honor --  
9 Question One I agree with you. I think Question One is the  
10 reason this case is in hearing. Your second question, I plan  
11 to introduce no evidence on that. This comparative case ran  
12 its course through to the U.S. Court of Appeals which entered  
13 a decision affirming the grant to Mr. Bott which became final.

14 Of interest is that the comparative integration  
15 claim of Mr. Bott was not challenged in the U.S. Court of  
16 Appeals, it became final upon the Commission's denial of the  
17 application for review from the Review Board, and what's of  
18 exceedingly great interest is that the Mass Media Bureau was,  
19 as it always is, a party to the comparative proceeding and it,  
20 in the comparative proceeding, did not challenge Mr. Bott's  
21 integration plans.

22 JUDGE STEINBERG: I think you know as well as I do  
23 that yes, the Bureau is a party to the comparative proceeding,  
24 but to my knowledge, in the last, Lord knows how many years,  
25 the Bureau did -- does not participate in that aspect of the

1 proceeding and I mean, I -- at least my knowledge stems from  
2 1976 at the latest and so that doesn't mean anything really,  
3 if the Bureau didn't challenge it.

4 But to play devil's advocate, the fact that nobody  
5 challenged it doesn't mean that events which occurred  
6 subsequently didn't put it in a different light. Maybe there  
7 was no reason to challenge it in the 1987 hearing, but events  
8 which occurred subsequently placed into question the testimony  
9 and the intent. That's -- I think that's all the hearing  
10 designation order says.

11 Yes, if you had the same direct evidence as it

1 something. With respect to a conference, I'll probably try to  
2 talk you out of it. But if I can't, then we'll have -- you  
3 know, then we'll have a conference and if we can do something  
4 informally in my office and I issue a little order confirming  
5 it, you know, that would be -- I think that's better. But if  
6 you need me for anything, I'm here to try to help you resolve  
7 things. So we'll go off the record now.

8 (Whereupon, at 9:53 a.m. on Tuesday, July 20, 1993,  
9 the prehearing conference adjourned.)

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APPLICATIONS OF BLACKFOOT, IDAHO

**Name of Hearing**

MM DOCKET NO. 93-155

**Docket No.**

WASHINGTON, D.C.

**Place of Hearing**

July 20, 1993

**Date of Hearing**